

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
APPELLATE DIVISION

CONSTANTINE JOSEPH,

Appellant,

V.

GOVERNMENT OF THE VIRGIN ISLANDS,)

Appellee.

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Crim. App. No. 1999-313

Re: Terr. Ct. Crim. No. F416/1998

On Appeal from the Territorial Court of the Virgin Islands

Considered May 18, 2001

Filed December 10, 2001

Before: **RAYMOND L. FINCH**, Chief Judge, District Court of the Virgin Islands; **THOMAS K. MOORE**, Judge of the District Court of the Virgin Islands; and **EDGAR D. ROSS**, Territorial Court Judge, Division of St. Thomas, Sitting by Designation.

ATTORNEYS :

Alvin E. Entin, Esq.

Fort Lauderdale, FL.

Attorney for Appellant,

Joel H. Feld, Esq.,

Assistant Attorney General

St. Thomas, U.S.V.I.

Attorney for Appellee.

OPINION OF THE COURT

PER CURIAM.

On May 19, 1996, Clyde Cameron ["Cameron"] was shot to death at Clinton Phillips Race Track. Constantine Joseph ["Joseph" or "appellant"] was arrested in the slaying, and the Government of the Virgin Islands ["government" or "appellee"] charged him with first degree murder in violation of section § 922(a)(1) of title 14 of the Virgin Islands Code and with carrying a deadly weapon during a crime of violence in violation of 14 V.I.C. § 2251(a)(2). A jury was empaneled on June 7, 1999, and on June 10th it returned its verdicts of not guilty of first degree murder, but guilty of the lesser included offense of voluntary manslaughter in violation of 14 V.I.C. § 924(1) and guilty of possession of a deadly weapon during a crime of violence. On August 12, 1999, the court sentenced Joseph to consecutive ten- and three-year sentences.

During the trial, Joseph moved for a new trial and a mistrial, which the court denied. On June 23, 1999, he filed a motion for new trial, which was denied on September 1, 1999. Appellant then filed a timely notice of appeal. Joseph asserts that the trial judge abused her discretion when she denied Joseph's motion for a new trial after the court made a substantial, post-argument correction to the jury instructions.¹

¹ Joseph raises two other grounds on appeal, namely, that the trial judge: (1) abused her discretion when she denied Joseph's motion for new trial based on the lack of credibility of Percival and the weight of the evidence demonstrating self-defense was an abuse of discretion; and (2) erred

This Court will vacate the conviction and remand for a new trial.

I. FACTUAL AND LEGAL BACKGROUND

The witnesses who testified at trial agreed on most details of the events of May 19, 1996. The government's key witness, Shawn Percival ["Percival"], testified that on the day of the shooting he attended the races at Clinton Phillips Race Track with Cameron and several others. (J.A. at 143.) When it began to rain, he and Cameron sought shelter in a horse stable. (*Id.*) Joseph testified that more than a year before the shooting, Cameron had assaulted and robbed him of several thousand dollars in jewelry. (*Id.* at 146-47, 159-60.) Percival confirmed that an incident had occurred between the two men the previous year. (*Id.* at 21-22.) Joseph testified that on the day of the shooting, he encountered Cameron and several of his friends smoking marijuana² in a stable, and that upon seeing Joseph, Cameron and his friends started to whisper in each others' ears, causing Joseph to fear he might be robbed and beaten again. (*Id.*

when she denied Joseph's motion for mistrial based on the government's failure to provide Joseph with *Brady* and *Giglio* evidence impeaching Percival's credibility. As this Court is vacating Joseph's conviction and remanding for a new trial based on the corrected jury instruction, we need not reach these other grounds.

² Toxicological reports confirmed that the victim, Cameron, had been smoking marijuana before his death.

at 150.) Percival confirmed that he and another friend were with Cameron at the stable that day. (*Id.* at 25.) Joseph then observed Cameron remove his jewelry and hand it to a friend in preparation to fight. (*Id.* at 158.) Both Joseph and Percival testified that Cameron and Joseph then began to stare each other down as if ready to fight. (*Id.* at 28, 150.) Joseph's and Percival's versions of events diverge at this point.

Joseph testified that Cameron then picked up a two-by-four with a protruding nail, at which point Joseph reached into his back pocket for his gun and tried to deter Cameron from advancing. (*Id.* at 159-61.) Percival recalled that one of Joseph's companions slipped a gun case to Joseph, from which he removed a gun, walked up to Cameron, and put the gun to his neck, and then Cameron bent down and picked up the two-by-four and started hitting Joseph, events which Joseph denied (*Id.* at 161, 171-74.) Both Joseph and Percival testified that Joseph did not fire the first shot until after Cameron had delivered numerous blows to Joseph's head.³ (*Id.* at 28-29, 162.) After several more minutes of scuffling, Percival then heard a second shot and saw Cameron run from the stable and collapse with a bullet hole in his chest. (*Id.* at 43-45.) Percival admitted he did not

³ The parties neither state nor refer to anything in the record that would indicate that the first shot hit anyone.

"see" Joseph shoot Cameron because of the crowded close quarters of the scuffle, but he knew he had, because Joseph had the gun in his hand when Percival heard the second gunshot. (*Id.* at 43.)

The lead investigator on the case, Detective Delbert Phipps, testified that he approached Percival a couple of days after the incident, but Percival did not make a statement and did not even want to talk about the incident. (*Id.* at 73.) After several attempts, detectives convinced Percival to finally make a statement, which he did for the first time on June 26, 1996. (*Id.* at 77, 94.) At trial, after Percival had testified, Joseph moved for a mistrial based on an alleged *Brady* violation due to the government's failure to turn over the statement made by Percival that could exculpate Joseph. (Br. of Appellant at 8.) The statement included Percival's claim that he did not "see" his friend get shot. (*Id.* at 6.) The judge denied the motion and permitted Joseph to recall Percival to the stand and cross-examine him. (*Id.* at 8-10.)

Before closing arguments, both sides requested a jury instruction on count II that defined a "crime of violence" as including murder, but not manslaughter, which the judge accepted. (Br. of Appellant at 14-16; J.A. at 175-76.) In his closing argument, counsel for Joseph then argued that there was no basis for a murder conviction, but that voluntary manslaughter was "at

least . . . something you can talk about," (J.A. at 171) and that jurors "probably ought to pay a little more attention to" to the manslaughter charge (*Id.*). Counsel then went on to urge the jury to reject even the charge of voluntary manslaughter, since Joseph had acted in self-defense. (*Id.* at 172-73.) Finally, counsel argued, if the jury accepted that Joseph was not guilty of murder or manslaughter, then they were compelled to find him not guilty of possession of a deadly weapon during the commission of a crime of violence:

If you make the judgment that Mr. Joseph acted in self-defense and is not guilty of first degree murder, second degree murder or manslaughter because he acted in self-defense, you must find him not guilty of the second count in the Information and that's because, unless you find that he committed a murder, he could not have used the weapon in the course of committing that act.

(*Id.* (emphasis added).)

The next day, in response to a jury note, the trial court judge realized that the court erred in excluding voluntary manslaughter from the definition of "crime of violence." The judge consulted with both side and decided to correct the instruction for the jury. (*Id.* at 189-92.) Counsel for Joseph immediately moved for a mistrial, which the court denied. (*Id.* at 192-95.) The judge thereafter gave the jury the correct

instructions. (*Id.* at 195-97.) Joseph moved for a new trial, which the court denied.

II. DISCUSSION

A. Jurisdiction and Standard of Review

This Court has jurisdiction to review final judgments and orders of the Territorial Court in criminal cases. See 4 V.I.C. § 33.⁴ The denial of motions for a mistrial or a new trial are reviewed for abuse of discretion. See *Virgin Islands v. Sampson*, 42 V.I. 247, 252, 94 F. Supp. 2d 639, 643 (D.V.I. App. Div. 2000). When a *Brady* violation is alleged, the Court reviews issues of law *de novo* and factual findings for clear error. See *United States v. Ramos*, 27 F.3d 65, 67 (3d Cir. 1994).

B. Denial of Motion for New Trial Based on Altered Jury Charge

Rule 30 of the Federal Rules of Criminal Procedure requires that the court advise counsel of its rulings on their requested instructions before closing arguments. See FED. R. CRIM. P. 30 ("The court shall inform counsel of its proposed action upon the requests [for jury instructions] prior to their arguments to the

⁴ See V.I. CODE ANN. tit. 4, § 33 (1997); Revised Organic Act of 1954 § 23A; 48 U.S.C. § 1613a. The complete Revised Organic Act of 1954 is found at 48 U.S.C. §§ 1541-1645 (1995 & Supp. 2000), reprinted in V.I. CODE ANN. 73-177, Historical Documents, Organic Acts, and U.S. Constitution (1995 & Supp. 2000) (preceding V.I. CODE ANN. tit. 1) ["REV. ORG. ACT"].

jury.");⁵ see also *Cheatham v. Government of the Virgin Islands*, 30 V.I. 296, 305-06 (D.V.I. App. Div. 1994) (noting that Rule 30 does not require court to advise counsel of all instructions to be given, only requested instructions). When a court changes its mind respecting requested instructions during or after closing arguments, it necessarily violates Rule 30. See *United States v. Pemberton*, 121 F.3d 1157, 1167-68 (8th Cir. 1997) ("The District Court clearly violated . . . rule [30] by changing its mind about the instruction in the midst of closing arguments.").

It is undisputed that both parties' proffered and the court gave the instruction that to find Joseph guilty of possession of a dangerous weapon during the commission of a crime of violence, the jury first had to find him guilty of a crime of violence, to wit, first or second degree murder, but not manslaughter. (Br. of Appellant at 8.) The judge's post-closing correction of that instruction to include manslaughter as a crime of violence therefore violated Rule 30.

Such a violation is prejudicial when the defendant is "unfairly prevented from arguing his . . . defense to the jury or . . . substantially misled in formulating and presenting

⁵ The Federal Rules of Criminal Procedure apply to the Territorial Court. See TERR. CT. R. 7 ("The practices and procedure in the Territorial Court shall be governed by the Rules of the Territorial Court and, to the extent not inconsistent therewith, by . . . the Federal Rules of Criminal Procedure").

arguments." *Cheatham*, 30 V.I. at 306 (quoting *United States v. Gaskins*, 849 F.2d, 454, 458 (9th Cir. 1988) (alternation in original)). Joseph claims that, because he relied on the previously agreed-to instruction in making his closing argument, the judge's post-argument correction prejudiced him in two ways. First, it discredited his counsel because counsel had argued to the jury that voluntary manslaughter did not satisfy the element of a crime of violence in Count II, only to have the judge later contradict him by specifically instructing the jury that it did satisfy that element. Second, he was substantially misled in forming his argument to virtually concede guilt on voluntary manslaughter to shift the jury's attention away from first or second degree murder.

Joseph contends that his sole strategy on Count II was to argue to the jury that there was no evidence of first or second degree murder, but to concede to them that voluntary manslaughter was "at least . . . something you can talk about." (Br. of Appellant at 35; J.A. at 171.) Evidently, his strategy was to direct the jury towards voluntary manslaughter, which he was fully justified in believing was not a crime of violence based on the court's instruction. (J.A. at 174-76.) As the manslaughter charge carried a maximum sentence of ten years,⁶ while each of

⁶ See 14 V.I.C. § 925.

the murder charges carried a maximum of life imprisonment,⁷ it was a rational strategy to steer the jury towards an offense with a ten-year maximum sentence and away from those carrying a potential life sentence. The trial court's instruction to the jury during deliberations irreparably undermined this strategy and misled Joseph in formulating and presenting his arguments. The trial judge accordingly abused her discretion in denying Joseph's motion for a mistrial. This Court will vacate Joseph's conviction and remand to the Territorial Court for a new trial.

III. CONCLUSION

The trial court's post-closing correction of the jury instruction to include voluntary manslaughter as a crime of violence constituted prejudicial error under Rule 30 of the Federal Rules of Criminal Procedure. Therefore, this Court will vacate the appellant's conviction and remand to the Territorial Court for a new trial.

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See id. § 923.

Joseph v. Government
Crim. App. No. 1999-313
Opinion & Order
Page 11

ENTERED this 10th day of December, 2001.

ATTEST:
WILFREDO MORALES
Clerk of the Court

**By: _____/s/_____
Deputy Clerk**

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
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For the reasons set forth in the accompanying Opinion of
even date, it is hereby

ORDERED that the appellant's conviction is **VACATED**; and it
is further

ORDERED that this matter is **REMANDED** to the Territorial
Court for a new trial.

ENTERED this 10th day of December, 2001.

ATTEST:
WILFREDO MORALES
Clerk of the Court

By: _____/s/_____
Deputy Clerk